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JOHN D. DIAMOND; and DIAMOND PHILLIPS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

VAN PHILLIPS,

Plaintiff,

v.

JOHN D. DIAMOND; DIAMOND
PHILLIPS, INCORPORATED, an Illinois
Corporation,

Defendants.

No. C073305 SI

**ANSWER TO FIRST AMENDED COMPLAINT
FOR FRAUD, BREACH OF CONTRACT,
CONVERSION, COMMON LAW
ACCOUNTING, AND UNJUST ENRICHMENT;
DEMAND FOR JURY TRIAL**

Judge: Honorable Susan Illston

Complaint Filed: June 22, 2007
Trial Date: None set

Defendants JOHN D. DIAMOND ("Diamond") and DIAMOND PHILLIPS, INC.
("DPI") (jointly hereinafter "Defendants") answer the First Amended Complaint ("FAC")
of Plaintiff VAN PHILLIPS ("Plaintiff"), and specifically denies liability or fault
whatsoever with respect to the matters complained of in the FAC, as follows:

I

ANSWER TO SPECIFIC ALLEGATIONS OF PLAINTIFF'S COMPLAINT

1. Responding to the allegations of Paragraph 1, Defendants do not have
sufficient information to admit or deny these allegations and on that basis deny each and
every one of them.

2. Responding to the allegations of paragraph 2, Defendants admit that
Diamond is a citizen of the state of Utah.

1 3. Responding to the allegations of paragraph 3, Defendants admit the
2 allegations contained therein.

3 4. Responding to the allegations of Paragraph 4, Defendants do not have
4 sufficient information to admit or deny these allegations and on that basis deny each and
5 every one of them.

6 5. Responding to the allegations of paragraph 5, Defendants admit they
7 provided architectural, engineering and interior design services to Plaintiff and further
8 admit the allegations contained therein, save and except for the term "work product"
9 which is not defined sufficiently to allow Defendants to admit or deny such allegation and
10 accordingly, on information and belief, Defendants deny they were to provide
11 architectural, engineering, and interior design "work product."

12 6. Responding to the allegations of paragraph 6, Defendants admit the
13 allegations contained therein.

14 7. Responding to the allegations of paragraph 7, Defendants admit that
15 Diamond did inform Plaintiff that DPI could purchase windows and doors through
16 Contractors Window Supply in Utah, and Plaintiff requested DPI to do so. Save and
17 except for such facts, Defendants deny the remaining allegations of the paragraph.

18 8. Responding to the allegations of paragraph 8, Defendants admit that
19 Plaintiff requested that DPI order windows and doors for projects known as the Green
20 House located in Little River, CA, the Farm House and Tea House both located in Albion,
21 CA, and the Sausalito Main House located in Sausalito, CA. Defendants further admit
22 DPI did purchase windows and doors but Plaintiff failed to make complete payment for
23 such windows and doors and refused to take delivery or possession of such windows and
24 doors. Defendants further admit that Plaintiff requested that DPI order plumbing fixtures
25 and appliances for the Green House and the Farm House. Plaintiff did pay amounts
26 towards such purchase to DPI but due to changes in the scope of the projects by Plaintiff,
27 Plaintiff's order for the fixtures and appliances were cancelled and the Plaintiff was given
28

1 a credit for the payments made. Save and except for such facts, Defendants deny the
2 remaining allegations of the paragraph.

3 9. Responding to the allegations of paragraph 9, Defendants admit that
4 pursuant to the refusal of Plaintiff to take delivery of the windows and doors, the windows
5 and doors are being stored by Contractors Window Supply in Utah. Save and except for
6 such facts, Defendants deny the remaining allegations of the paragraph.

7 10. Defendants deny the allegations of paragraph 10.

8 11. Responding to the allegations of paragraph 11, the term "work product"
9 is not defined sufficiently to allow Defendants to admit or deny such allegation and
10 accordingly, on information and belief, Defendants deny the allegations of paragraph 11.

11 12. Defendants deny the allegations of paragraph 12.

12 13. Responding to the allegations of paragraph 13, Defendants reallege and
13 incorporate by reference their responses to the allegations contained in paragraphs 1
14 through 12.

15 14. Defendants deny the allegations of paragraph 14.

16 15. Defendants deny the allegations of paragraph 15.

17 16. Defendants deny the allegations of paragraph 16.

18 17. Defendants deny the allegations of paragraph 17.

19 18. Defendants deny the allegations of paragraph 18.

20 19. Responding to the allegations of paragraph 19, Defendants reallege and
21 incorporate by reference their responses to the allegations contained in paragraphs 1
22 through 12, 14 through 18.

23 20. Responding to the allegations of paragraph 20, Defendants admit that
24 Plaintiff and Defendant entered into a contract whereby Defendants agreed to provide
25 architectural, engineering and design services in exchange for money. Defendants further
26 admit that DPI agreed to order certain construction materials for Plaintiff. Save and
27 except for such facts, Defendants deny the remaining allegations of the paragraph.

28 21. Defendants deny the allegations of paragraph 21.

1 22. Defendants deny the allegations of paragraph 22.

2 23. Responding to the allegations of paragraph 23, Defendants reallege and
3 incorporate by reference their responses to the allegations contained in paragraphs 1
4 through 12, 14 through 18, and 20 through 22.

5 24. Responding to the allegations of paragraph 24, Defendants admit that
6 Plaintiff had a right to obtain possession and control of the windows and doors upon full
7 payment for such windows and doors and in anticipation of full payment Defendants
8 tendered possession of the windows and doors to Plaintiff who refused to accept
9 possession or control. Save and except for such facts, Defendants deny the remaining
10 allegations of the paragraph.

11 25. Defendants deny the allegations of paragraph 25.

12 26. Defendants deny the allegations of paragraph 26.

13 27. Defendants deny the allegations of paragraph 27.

14 28. Responding to the allegations of paragraph 28, Defendants reallege and
15 incorporate by reference their responses to the allegations contained in paragraphs 1
16 through 12, 14 through 18, and 24 through 27.

17 29. Defendants deny the allegations of paragraph 29.

18 30. Defendants deny the allegations of paragraph 30.

19 31. Defendants deny the allegations of paragraph 31 to the extent it implies
20 that Plaintiff did not have it within his control at all times to obtain possession of the
21 windows and doors. Save and except for such facts, Defendants deny the remaining
22 allegations of the paragraph.

23 32. Defendants deny the allegations of paragraph 31.

24 33. Responding to the allegations of paragraph 33, Defendants reallege and
25 incorporate by reference their responses to the allegations contained in paragraphs 1
26 through 12, 14 through 18, and 24 through 27, and 29 through 32.

27 34. Defendants deny the allegations of paragraph 34.

28 35. Defendants deny the allegations of paragraph 35.

II

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

The FAC fails to state facts sufficient to constitute a cause of action upon which relief may be granted against Defendants.

SECOND AFFIRMATIVE DEFENSE

(Statute of Limitations)

Defendants allege on information and belief that the claims alleged in the FAC are barred by the applicable statute of limitations.

THIRD AFFIRMATIVE DEFENSE

(Conduct of Others)

If Plaintiff suffered any damages, they were proximately caused, in whole or in part, by the tortious acts, omissions, and/or fault of Plaintiff, and/or other persons or entities, other than Defendants. Accordingly, Plaintiff's recovery from Defendants, if any, should be barred or, in the alternative, reduced in proportion to the percentage of Plaintiff's or other third parties' fault.

FOURTH AFFIRMATIVE DEFENSE

(Laches)

Defendants allege that Plaintiff has unreasonably delayed in bringing this action, without good cause therefore. Said delay has directly resulted in prejudice to answering Defendants, and this action should be barred by the doctrine of laches.

SIXTH AFFIRMATIVE DEFENSE

(Unclean Hands/Fraud)

Plaintiff and his assignors are barred by the doctrine of unclean hands from asserting any claims against Defendants, due to their fraudulent, tortuous, and wrongful conduct.

1 SEVENTH AFFIRMATIVE DEFENSE

2 (Breach of Contract)

3 As to the causes of action based upon a purported contract or agreement, the
4 answering Defendants allege that Plaintiff breached, repudiated, abandoned or otherwise
5 inadequately performed any contract or agreement upon which the FAC is based.

6 EIGHTH AFFIRMATIVE DEFENSE

7 (Estoppel)

8 Defendants allege that this action is barred as to Plaintiff by the doctrine of
9 estoppel.

10 NINTH AFFIRMATIVE DEFENSE

11 (Full Performance or Payment)

12 As and for a further, separate and distinct answer and defense to the FAC on
13 file herein, and to each and every purported cause of action contained therein, the
14 answering Defendants allege that Defendant performed, satisfied and discharged any and
15 all duties and obligations Defendants may have owed Plaintiff and/or any other individual
16 or entity.

17 TENTH AFFIRMATIVE DEFENSE

18 (No Right for Award of Punitive Damages)

19 Plaintiff is not entitled to punitive or exemplary damages because Plaintiff fails
20 to allege facts sufficient to warrant an award of punitive damages and has further
21 incorporated claims for punitive damages within causes of action for which punitive
22 damages are not allowed.

23 ELEVENTH AFFIRMATIVE DEFENSE

24 (Indemnification)

25 If Plaintiff recovers from Defendants, Defendants are entitled to
26 indemnification, either in whole or in part, from Plaintiff and/or all persons or entities
27 whose negligence and/or fault proximately contributed to Plaintiff's losses, injuries, and
28 damages, if there were any.

TWELFTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

Plaintiff has failed to mitigate or attempt to mitigate damages if in fact any damages have been or will be sustained, and any recovery by Plaintiff must be diminished or barred by reason thereof.

THIRTEENTH AFFIRMATIVE DEFENSE

(Consent)

The claims alleged in the FAC are barred by the doctrine of consent.

FOURTEENTH AFFIRMATIVE DEFENSE

(Waiver)

Plaintiff's action against Defendants is barred by the doctrine of waiver.

FIFTEENTH AFFIRMATIVE DEFENSE

(Set Off)

Some or all of Plaintiff's alleged damages, if any, should be set-off against amounts that are due and owing to Defendants from Plaintiff.

SIXTEENTH AFFIRMATIVE DEFENSE

(Failure of Condition Precedent)

As to those causes of action based upon a contract or agreement, Defendants allege the FAC, and each cause, is barred by Plaintiff's failure to perform or satisfy some or all of the conditions precedent to any obligation of Defendants under any contract or agreement.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Privilege)

Defendants were privileged and justified in acting as they did. Accordingly, Defendants cannot be liable for restitution and Plaintiff is not entitled to any other relief.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Failure to Do Equity)

As to each and every purported cause of action contained in the Complaint, Defendants allege that no relief may be obtained under the FAC or any purported cause of action by reason of Plaintiff's failure to do equity in matters alleged in the FAC.

NINETEENTH AFFIRMATIVE DEFENSE

(Novation, Modification, Abandonment, Rescission)

As to any and all cause based upon a purported contract or agreement, Defendants allege that such contracts or agreements have been the subject of oral and written modifications, abandonment or mutual rescission and therefore, Plaintiff's action is barred and/or Plaintiff's right of recovery as against Defendants, if any, is barred or must be reduced accordingly.

TWENTIETH AFFIRMATIVE DEFENSE

(Prevention of Performance)

As to any and all causes of action based upon a purported contract or agreement, Defendants allege that Plaintiff and/or other persons, entities or events prevented Defendants' performance thereby discharging any obligation on the part of Defendants to perform.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Unjust Enrichment)

Defendants allege that Plaintiff would be unjustly enriched if allowed to recover on the claims alleged in his Complaint; therefore, such recovery is precluded.

PRAYER FOR RELIEF

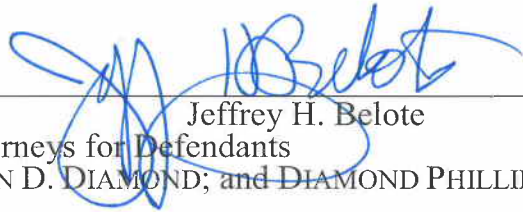
WHEREFORE, this answering Cross-Defendant prays as follows:

1. That Cross-Complainants take nothing by their Cross-Complaint and that the same be dismissed forthwith as to this Cross-Defendant;
2. For costs of suit herein incurred; and

3. For such other and further relief as this Court deems proper

Dated: October 15, 2007

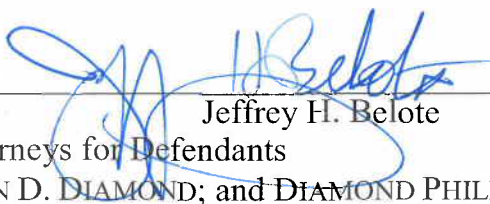
CARROLL, BURDICK & McDONOUGH LLP

By  Jeffrey H. Belote
Attorneys for Defendants
JOHN D. DIAMOND; and DIAMOND PHILLIPS, INC.

DEMAND FOR JURY TRIAL

Defendants JOHN D. DIAMOND and DIAMOND PHILLIPS, INC. hereby request a jury trial.

CARROLL, BURDICK & McDONOUGH LLP

By  Jeffrey H. Belote
Attorneys for Defendants
JOHN D. DIAMOND; and DIAMOND PHILLIPS, INC

CERTIFICATE OF SERVICE

I hereby certify that Defendants JOHN D. DIAMOND'S and DIAMOND PHILLIPS, INC.'S Answer to First Amended Complaint for Fraud, Breach of Contract, Conversion, Common Law Accounting, and Unjust Enrichment; Demand for Jury Trial was served electronically on October 15, 2007, on the individuals on the attached Service List.


Kelli R. Bremer

1 *Phillips v. Diamond, et al.*

2 USDC-Northern District, San Francisco Division, Action No. C073305 SI

3 **SERVICE LIST**

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